COURT, U.S.

74-803

FILED
DEC 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. .....

MIKE YATZOR,

Petitioner,

vs.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, all individually and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, individually, and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MIKE YATZOR,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Order of the Court of Appeals for the Third Circuit dated September 4, 1974, dismissing the Appeal is in App. A, p.la. The Order of Court of Appeals dated September 26, 1974 denying Petitioner's Petition for Rehearing is in App. B, p. 2a, *infra*. The Opinion and Order of Judge Gerald J. Weber of the District Court for the Western District of Pennsylvania, dated November 8, 1973 which dismissed Plaintiff's Complaint, and action with prejudice is in App. C, p. 3a *infra*.

Jurisdiction

The Judgment Order of the Court of Appeals was dated and filed September 4, 1974 affirming the judgment of the District Court which dismissed Plaintiff's Complaint. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing was dated and filed September 26, 1974. This Petition is timely filed under 28 U. S. C. Sec. 2101(c). This Court's jurisdiction is invoked pursuant to 28 U. S. C. 1254(1).

Questions Presented

1. In a Civil Rights Action for damages, injunction, and an attack on the consitutionality of a State Police Tenure Act, where a duly appointed township Chief of Police was prevented under color of State law from his expectancy of continued public employment in reprisal for exercise of his right of free speech, without being given reasons and a hearing thereon, did the Court Below err by deciding disputed questions of material fact on a Motion for Summary Judgment, instead of determining only if there were a genuine issue of any material fact?

2. Whether the Court Below erred on Motion for Summary Judgment by deciding disputed questions of material facts concerning whether the Chief's employment were lawfully terminated, or ever terminated, and if his employment contract were a continuing one so he had a continuing cause of action, or if there were fraudulent concealment of the accrual of his right of action, or estoppel, under applicable Pennsylvania laws, and in misinterpreting Pennsylvania law, in that his action was not barred by the Statute of Limitations.

3. Whether the Court Below erred in denying Petitioner the right to take depositions on all or some of the issues of fact set forth above, before considering and deciding if there were a genuine issue of any material fact, and by deciding disputed questions of material fact, depriving him of his day in Court.

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Statement of the Case

Plaintiff filed an action under the Civil Rights Statutes in 42 U.S.C. §1983, 1985, 1986, and 28 U.S.C. §1343, alleging his civil rights under the Constitution had been violated by Defendants preventing his continued employment as Police Chief of Washington Township, Erie County, Pa., because of his exercise of his right of free speech about the local government. His Complaint asked for damages, and an injunction, attacking the constitutionality of the Police Tenure Statute in Pennsylvania for Second Class Townships having less than 3 members, in 53 Purdon's Statutes 811, et seq., and for a 3 Judge Statutory Court under 28 U.S.C. 2281 et seq.

This action was filed July 6, 1973. Defendants under Rule 12 filed a Motion to Dismiss, inter alia claiming it was barred by the Statute of Limitations, attaching an Affidavit of counsel about State Court proceedings in Pa., between Plaintiff and some of the instant Defendants. Plaintiff and two of his former Counsel filed Opposition Affidavits. Hearing and Argument was held before Honorable Gerald Weber, Erie District, on September 5, 1973, with only counsel present. Plaintiff was given additional time to file Supplemental Brief and Affidavits, with right of Defendants to reply. Plaintiff filed Supplemental Affidavits of his, one of prior counsel, and two witnesses. The Court would not permit Plaintiff to take depositions.

Then the Court by Opinion and Order dated November 8, 1973, granted Defendants' Motion to Dismiss Plaintiff's Complaint and action with prejudice, treating it as a Motion for Summary Judgment, finding it was barred by the applicable Statute of Limitations. No express disposition was made of Petitioner's request for injunction or convening of a 3 Judge Court.

Plaintiff, Mike Yatzor, was duly hired by the Washington Township Board of Supervisors to be the Township police-

man for an indefinite term of employment on April 7, 1962 at a meeting of the Supervisors which then consisted of two of the present Defendants, Shields and Showman, and one Borland, the latter being replaced in 1964 by Allen, one of the other Defendants. Plaintiff was appointed Chief of Police by Defendant Shields, Chairman of the Board, and performed his duties continuously until January 7, 1967, satisfactorily and without any complaints being made to him by any of the Defendants or anyone else. On January 9, 1965, his compensation was changed from an hourly rate to $100 a month, but except for that, there was no yearly motion to continue him as such. It had been the custom and practice of the Township Supervisors to continue all employees in their positions from year to year without formal vote, so he had an expectancy of continued employment. In January, 1968, Shields was replaced by Tracy; in January, 1970, Allen was replaced by Sanders; in January, 1972, Showman was replaced by Hecker, as Township Supervisors, all of whom are Defendants.

Washington Township, Pennsylvania is a second-class township, having been organized and existing under the Pennsylvania "Second-Class Township Code," 1933, May 1, P. L. 103, Art. 1, Sec. 101, et seq., as amended (53 Purdon's Statutes 65101 et seq). The minutes of a meeting of the Supervisors on January 7, 1967 state: "Mike Yatzor was present and gave his police report. Being the first month of the year it would be necessary to move for his services for the year 1967. No action taken and so notified." No formal action, motion, resolution, ordinance or any other legislative action was formally taken or voted upon by the Supervisors discharging or suspending him, nor were any reasons given him. Also, there was no motion made to continue the employment of any other employees of the township or to discharge or dismiss any of them.

Plaintiff, through his counsel, by letter dated March 21, 1967, requested he be given notice in writing of any charges against him and a Hearing thereon. Neither Plaintiff, nor his counsel, Attorney Walsh, at the time, were ever contacted or notified directly whether or not written notice of charges and a hearing before the Supervisors would be granted Plaintiff. The Chief still believed he was the Police Officer for the Township on and after January 7, 1967.

At no time had the Township taken away his Chief of Police badge and uniform, even for a period of several years later. Starting about a week after Plaintiff's attorney wrote the letter of March 21, 1967, asking for written statement of charges and a hearing thereon, several of the Supervisors told the Chief to hold off legal proceedings as they thought the matter could be worked out without there being a lawsuit and whereby he would be permitted to continue to work for the Township. These promises continued from January, 1967 until a meeting of the Supervisors of April 6, 1968. During this entire period of time the Chief held himself ready, willing and able to continue to serve and even continued to get phone calls from various residents about police matters, which he took care of, between January, 1967 until early 1970. The Township Solicitor gave a written opinion dated March 28, 1968, which was read at the Supervisors meeting of April 6, 1968, which minutes show "The Board agreed to it." The Opinion stated "Mr. Yatzor is now claiming he is still officially the Township Police Officer although he has not received any compensation from January 1, 1967 . . . he also maintains his salary is due him from that date to the present date at $100 per month." The opinion further stated "This was definitely a hiring at will as there was no specific period of time for which he was hired and, therefore, under the law his services may be terminated at any time and for any reason."

Between August, 1967 and about May, 1970, numerous discussions and negotiations went on between Plaintiff's counsel Attorney Walsh, and Defendants' counsel, the Solicitor Mr. Toohey, about permitting the Chief to resume his duties as Chief of Police for the Township without the necessity of proceeding further with litigation. Both Plaintiff and his original counsel, relied on these representations of some of the Defendant Supervisors and their counsel, and were induced to withhold further legal proceedings and from exercising his legal remedies sooner, and exercising his other legal remedies available to him.

Even at a meeting March 7, 1970, which was proved by Affidavit filed by Plaintiff in opposition to the motion, it was stated by the Township Solicitor that they were working on a solution and settlement of the matter whereby no one would be hurt. No other police were hired in Plaintiff's place up until the time of suit in Federal Court. Plaintiff was the sole police officer. Plaintiff had talked with some of the Supervisors about the Township having ordinances for zoning, sewer system, and for junkyard control and for better enforcement of the law, which was resented by them as interfering with township affairs. Plaintiff's Complaint alleged that he had an expectancy of continued employment which some of the Defendants conspired to deny him and to deny him liberty and property without due process of law and equal protection of the laws. Also, it alleged that it would be arbitrary discrimination and denial of due process and equal protection of the laws to apply the Pennsylvania Statute known as "The Police Tenure Act" in 53 P. S. 811, et seq. to him and/or its application to the circumstances of the case violated his said rights because it discriminated between second-class township policemen, such as he, and first-class township policemen, having three or more members, and borough policeman, all of whom are given written charges and a hearing thereon before dismissal or discharge from service under the Pennsylvania statutes applicable to

the latter. The Complaint asked the defendants be required to give him written reasons and a hearing thereon and to retain him as Chief.

After the District Court dismissal of Plaintiff's Complaint and action with prejudice on November 8, 1973, Petitioner took a timely Appeal to the Court of Appeals for the Third Circuit, which Court affirmed the Judgment of the District Court without oral argument, being submitted under Third Circuit Rule 12(6). Then timely Petition for Rehearing was filed by Petitioner, which was denied by the Court of Appeals on September 26, 1974.

REASONS FOR GRANTING THE WRIT

At issue here is whether the Court of Appeals by affirming the Judgment of the District Court has sanctioned a departure of the District Court from the firm and established rule of the Court's scope of authority and function on considering a Motion under Rule 12 which is converted into a Motion for Summary Judgment under Rule 56, and in deciding that Plaintiff's action was barred by the Statute of Limitations, thereby depriving the Petitioner of his day in Court. This issue, although one of procedure, merges imperceptibly into the substantive rights of this Plaintiff whose rights have been denied him because of misapplication of this rule to the facts and circumstances of the case. Also, this has resulted in denying him his constitutional basic rights contrary to applicable decisions of the Court, and contrary and in conflict with decisions of other Courts of Appeals on the same matter, and even the same Court of Appeals. Further, the Circuit Court and District Court have decided important state questions in a way that conflicts directly with applicable Pennsylvania State Law. In short, the Courts Below have said that it's proper for a Court on such a motion to *decide* disputed questions of material fact on such a motion instead of only inquiring and determining if there were a genuine issue of any material fact.

It is submitted a Writ of Certiorari should be granted for the following reasons:

(a) The Third Circuit has decided important Federal questions in a way in conflict with applicable decisions of this Court.

(b) The Circuit Court decided an important question of Federal law which has not been and should be settled by this Court.

(c) The Circuit Court has rendered an Order and Decision in conflict with decisions of other Courts of Appeal and of the same Court on the same, or similar matter.

(d) The Court of Appeals has decided important State questions in a way in direct conflict with applicable State law and State decisions.

1. IN A CIVIL RIGHTS ACTION FOR DAMAGES, INJUNCTION, AND AN ATTACK ON THE CONSTITUTIONALITY OF A STATE POLICE TENURE ACT, WHERE A DULY APPOINTED TOWNSHIP CHIEF OF POLICE WAS PREVENTED UNDER COLOR OF STATE LAW FROM HIS EXPECTANCY OF CONTINUED PUBLIC EMPLOYMENT IN REPRISAL FOR EXERCISE OF HIS RIGHT OF FREE SPEECH, WITHOUT BEING GIVEN REASONS AND A HEARING THEREON, DID THE COURT BELOW ERR BY DECIDING DISPUTED QUESTIONS OF MATERIAL FACT ON A MOTION FOR SUMMARY JUDGMENT, INSTEAD OF DETERMINING ONLY IF THERE WERE A GENUINE ISSUE OF ANY MATERIAL FACT?

(a) The Third Circuit has decided important Federal questions in a way in conflict with applicable decisions of this Court.

(i) In *Perry v. Sinderman, 33 L.Ed. 2d 570, 480 U. S. 593 (1972)* the Court affirmed the Court of Appeals reversing the granting of Summary Judgment in favor of the governing Board of Regents. The Court held that the Government may not deny a benefit to a person on the basis that infringes on his constitutionally protected interests and free speech. Further the Court held that a teacher employed for a number of years at the same institution *should be permitted to show, even though no explicit tenure system existed, a De Facto tenure system did exist which would entitle him to a hearing with advance notice of the grounds of his non-retention, and an opportunity to refute them.* (Emphasis supplied)

Sinderman filed an action very similar to the one at bar seeking a mandatory injunction, compensatory and punitive damages, attorneys fees and declaratory judgment under 42 U.S.C. §1983, also. The Court said at page 577: "[1] The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not . . . *there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech . . . But most often, we have applied the principle to denials of public employment* . . . (citing cases). We have applied the principle re*gardless of the public employee's contractual or other claim to a job.*" The Court further said at page 578 "[4] *Thus the respondent's lack of a contractual or tenure "right" to reemployment* for the 1969-1970 academic year *is immaterial to his free speech claim.* Indeed, twice before, this Court

has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and *Fourteenth Amendment rights.* Shelton v. Tucker, Supra; Keyishian v. Board of Regents, Supra. We affirm those holdings here . . . [5] But we agree with the Court of Appeals that *there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis – as a reprisal for the exercise of constitutionally protected rights."* 430 F2d, at 943 . . . Plainly these allegations present a bona fide constitutional claim." These principles strongly apply to the case at bar which the Lower Court decided contrary thereto.

In *Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586 29 L.Ed. 2d 90 (1971)* the Court said at page 96 (29 L.Ed. 2d 96) *"The hearing required by the Due Process Clause, must be 'meaningful'*, Armstrong v. Manzo, 380 U. S. 545, 552 (1965) and *'appropriate to the nature of the case.'* Mullane v. Central Hanover Bank & Trust Co., (*Supra*). It is a proposition which hardly seems to need explication *that a hearing which excludes consideration of an element essential to the decision* whether licenses of the nature here involved shall be suspended does not meet this standard." (emphasis supplied) The Court further said at page 96 "While many controversies have raged about . . . the Due Process Clause, Mullane v. Central Hanover Bank & Trust Co., 229 U. S. , 212, it is fundamental that except in emergency cases (and this is not one) *due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."* (emphasis supplied)

In *Goldberg v. Kelly* (1970) 397 U. S. 254, 25 L. Ed. 2d 287 the Court held that procedural due process of the 14th Amendment required that Welfare recipients be afforded *an evidentiary* hearing *before* termination of benefits by

Welfare Authorities. Also, *the Court held that the New York procedure giving a post-terminal hearing would not meet such requirement.* The Court further held at pages 269 and 270 "In almost every setting where important decisions turn on *questions of fact, due process requires opportunity to confront and cross-examine adverse witnesses.*" (emphasis supplied)

The Court further stated on page 270, "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures any individual, *and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show it is untrue* . . . We have *formalized these protections in the requirements of confrontation and cross-examination.* They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. *It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny.*" (emphasis supplied).

(*b*) *The Circuit Court decided an important question of Federal law, which has not been, and should be settled by this Court.*

(i) In *Arnett v. Kennedy,* 416 U. S. 134, 40 L.Ed. 2d 15, 94 S. Ct. 1633, 42 U. S. L. W. 4513 (1974), the Court held that the Lloyd -- LaFollette Act, 5 U. S. C. Sec. 7501, confers on non-probationary Federal employees the right not to be discharged except for cause. It appears from the Opinion that a majority of the Court split on the question whether due process requires that such employees be accorded a full hearing and *whether the hearing must take place before the dismissal becomes final.* In the Arnett case (*Supra*), it involved a Federal Statute whereas in the case at bar it involves a State Statute, in 53 P. S. Purdon's Stat-

utes, 811 et seq., (in App. D) "Removal of Policemen in Certain Boroughs and Townships." However, the same principle is involved as in the Arnett case in the State Court proceedings referred to by Judge Weber, in his Opinion (App. C 4,5a), the State Court held that Petitioner herein was a "part-time employee," not entitled to written reasons and hearing thereon under the particular State Statute, before or after the dismissal become final, as he was not a "regular full-time police officer" mentioned in the statute. Later it is shown how the Lower Court erred in determining Pennsylvania law, so in fact and in law his employment was never terminated.

The Pennsylvania Court further said in the State Court proceedings between present Plaintiff and some of present Defendants in *Yatzor v. Showman*, et al., 5 Commonwealth Court 291, 290 A.2d 425 (1972) at page 294, "In the event that Appellant's argument, that he was included within the statutorily protected class is warranted, there is little doubt that he has suffered the right to protections guaranteed therein." As stated before the Court held he was a "part-time police officer," as he had another job and not a "regular full-time police officer," within 53 Purdon's Statutes 812. The present Petitioner never received a hearing at any time in the State Court proceedings and has been denied a hearing in the Federal Court proceedings to have important and material facts and questions developed, heard and decided by the trier of fact, be it the Judge or jury instead of having such material fact questions being decided on a motion under Rule 12 converted into a Motion for Summary Judgment under Rule 56. Rule 12 of this Court's Rule says that when a Motion to Dismiss is converted to a Motion for Summary Judgment, all parties "shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 56 says the Court may permit depositions, affidavits or answers to Interrogatories. Under

Rule 56 (f), on affidavit of a party who can't present by affidavit facts essential to justify his opposition, the Court can refuse judgment, or continue the Motion to permit discovery or deposition. The Court in this case only permitted use of Affidavits by Plaintiff. Plaintiff did file two affidavits of his own, two of former counsel and those of two witnesses as to the facts at issue. As part of his affidavits Plaintiff averred many of the facts set forth under Statement and Reasons. He did aver there were further facts within the exclusive possession and control of Defendants which he would allege after depositions. The Court went ahead and decided these disputed facts instead of determining only if there were a genuine issue of any material fact, contrary to this Court's ruling and other Court of Appeals decisions, as will be pointed out hereafter, denying the right to take depositions.

The point here is that Plaintiff's Complaint alleged that he had an expectancy of continued employment with the Township of which he was deprived in reprisal for his exercise of right of free speech, without being given written reasons and a hearing thereon, which clearly this Court has decided is such an interest and protected right entitled to these rights before being deprived thereof. Plaintiff claimed that he had "de jure" tenure as Chief of Police. Your Honorable Court, even in cases where there was "de facto" tenure, such as in the Perry case (Supra) decided that such tenure could not be terminated because of infringement on the right of free speech without written reasons and a hearing thereon. Plaintiff's Complaint further alleged that even assuming arguendo that he were a "part-time police officer" and therefore not entitled to written reasons and a hearing thereon under the Pennsylvania Statute in 53 P. S. 811 et seq., that its application to him or the circumstances of the case, violated his constitutional rights. Further he claimed that it would be arbitrary discrimination and deny him equal protection of the laws to apply this statute to him. Also

it discriminates between Second-class Township Policemen, such as he is, and First-class Township Policeman, having three or more members and Borough Policeman, who under other state law, are all given written reasons and a hearing thereon without any distinction whatsoever as to whether they are part-time or full-time. (App. G, H, I & J.)

Therefore, there is this important question of Federal law, which has not been squarely passed upon by the Court, but should be settled by your Honorable Court. Is there a valid basis for such distinction, or does this not violate due process of law and equal protection of the laws?

(*c*) *The Circuit Court has rendered an Order and Decision in conflict with decisions of other Courts of Appeal and of the same Court on the same, or similar matter.*

Judge Weber was inconsistent in his findings as far as date of Plaintiff's right of action accruing. On one hand the Court stated that "The first action which damaged the complaining party was . . . on January 7, 1967." (App. C 5a) Then the Court said "It is apparent that as of August 3, 1967, Plaintiff realized that efforts of conciliation and compromise were unavailing . . ." (App. C 5a) The Court further said, . . . "We again regard the institution of the State Court action in August, 1967, as conclusive evidence that the Plaintiff was aware of the actions and positions of the defendants." (App. C 7a) If Plaintiff's right of action accrued as of the time 'Plaintiff realized' that the Court found, to-wit on August 3, 1967 his instant action wouldn't be barred because it was filed on July 6, 1973 within six years of August 3, 1967. Plaintiff did file a Petition for Appeal to the Pennsylvania State Court of Erie County on August 3, 1967 to protect his rights as far as any lapse of time was concerned for taking an Appeal under that State's Statute, but the promises and representations of the Defendants and their Solicitor to hold off legal proceedings as they believed he would be restored to his position went on between a week

after March 21, 1967 until at least April 6, 1968, when the Solicitor's Opinion was approved at a Township Meeting, as set forth under Statement of Fact.

(i) In *Sheets v. Burman*, 322 F2d. 277 (5th C. A. 1963,) the Court of Appeals reversed the Summary Judgment of the Court Below, ruling that Plaintiff's malpractice action against a doctor presented disputed issues of fact as to when the doctor-patient relationship terminated, and whether alleged acts of malpractice had been fraudulently concealed from patient by doctor, who claimed Statute of Limitations barred the action.

In *Baker, et al v. F. & F. Investment, et. al.* 420 F.2d 1191 (C. A. 7—1970) the Court stated in this Civil Rights action that the touchstone in determining whether a cause of action is a continuing one for the purpose of application of the Statute of Limitations, *is the nature and extent of defendant's behavior and not the duration of Plaintiff's injuries.*" (Emphasis Supplied)

In *F. A. R. Liquidating Corporation v. Brownell*, 209 F.2d 375 (3d C. C. A. 1953), the Court by Judge Kalodner reversed the grant of Summary Judgment and stated at page 379, "But, although an affidavit filed in support of the Motion for Summary Judgment may be considered for the purpose of ascertaining *whether an issue of fact was presented, it cannot be used as a basis for deciding the fact issue.*" (Emphasis supplied) That case further held that the record disclosed an issue of fact which couldn't be determined on Summary Judgment Motion as to the time an owner of a patent had deposited a cable of acceptance of an offer relative to the transfer of the patent.

In *U. S. A. v. Rundle*, 453 F2d 147 (3d. C.C.A. 1971) Judge Adams said at page 150: "Documents filed in support of a Motion for Summary Judgment are to be used to determine whether issues of fact exist and *not to decide the fact issues themselves.*" (Emphasis Supplied)

In *Longo v. Pittsburgh and Lake Erie Railroad Company*, 355 F2d. 443 (C. C. A. 3d, 1966), Judge Hastie reversed the grant of Summary Judgment for defendant on the basis of the Statute of Limitations, holding that on the issue of estoppel there were such factual issues that couldn't be decided on such Motion. Plaintiff said he didn't sue before because Defendant's claim agent assured Plaintiff the case would be settled, he was not to worry and was specifically requested not to file suit. This case is very similar to the case at bar wherein Petitioner was requested by some of the Supervisors to withhold legal proceedings as they believed the matter could be worked out whereby he would be restored as Chief.

In *Semaan v. Mumford*, 335 F.2d 704, D. C. C.C.A. (1964,) In a suit for reinstatement by Plaintiff who claimed illegal discharge from his job at the Library of Congress, Judge Bazelon reversed grant of Summary Judgment for Defendants. The Court said at Page 706, "*He offered to prove facts which would establish that he was led by the Library to believe he was permanent*, that he relied on this course of conduct to his detriment, and that the Library by refusing to afford him the safeguards of a permanent employee sought to adopt a position inconsistent with its prior conduct. *Since these facts would constitute an estoppel, it was err to deny him the opportunity of proving them.* Footnote 7: "Although the estoppel theory was not explicitly argued below, it was plainly encompassed by the pleadings and was *clearly a 'discernible circumstance' in the Record before the Court.*" (Emphasis supplied)

In *Whitner v. Davis, et al.*, 410 Fed. 2d 24 (C. A. 9, 1965,) the Court reversed the granting of a Motion for Summary Judgment with prejudice and held that on the issues of whether relief under the Civil Rights Act was available, the Federal Court was not bound by the State Court's determination as to the adequacy of the State's administrative remedy.

The Pennsylvania State Court's decision between Plaintiff and some of the Defendants did not bind the Federal Court not to be able to determine if the State administrative remedy were adequate and if lack of the remedy violated Plaintiff's due process and rights and equal protection of the law.

The above cases clearly show the Court of Appeals made a decision in direct conflict with decisions of its own and other Courts of Appeal on Motions for Summary Judgment. Under Rule 56 of the Honorable Court, Summary Judgment is to be entered only if "there is no genuine issue as to *any material fact* and that the moving party is entitled to a judgment as a *matter of law*." (Emphasis supplied). The above cited cases clearly show the Lower Courts, in this case, went far beyond the scope of its proper inquiry on this Motion, by actually deciding disputed questions of fact and then finding there was no genuine issue of any material fact. The Court, in effect, has tried the case, depriving Petitioner of his day in Court, contrary to the Court's own decisions and decisions of Courts of Appeal and even contrary to Pennsylvania law, as set forth hereafter.

2. WHETHER THE COURT BELOW ERRED BY DECIDING DISPUTED QUESTIONS OF MATERIAL FACTS ON MOTION FOR SUMMARY JUDGMENT CONCERNING WHETHER THE CHIEF'S EMPLOYMENT WERE LAWFULLY TERMINATED, OR EVER TERMINATED, AND IF HIS EMPLOYMENT CONTRACT WERE A CONTINUING ONE SO HE HAD A CONTINUING CAUSE OF ACTION, OR IF THERE WERE FRAUDULENT CONCEALMENT OF THE ACCRUAL OF HIS RIGHT OF ACTION, OR ESTOPPEL UNDER APPLICABLE PENNSYLVANIA LAWS, AND IN MISINTERPRETING PENNSYLVANIA LAWS, IN THAT HIS ACTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

(*d*) *The Court of Appeals has decided important State questions in a way in direct conflict with applicable State law and State decisions.*

Rather than there being just a genuine issue of any material fact, there are probably genuine issues of many material facts in the case concerning important State questions, statutes and decisions of the Pennsylvania Courts, which the Lower Court not only went ahead and decided, but decided erroneously. Under Pennsylvania law, Plaintiff had never been "discharged," or "suspended," or dismissed or removed from his employment by any formal vote or legislative act by the defendant Township Supervisors. Further, under Pennsylvania law, he has a continuing contract and a continuing cause of action, including wage installments up to date of trial, which was not barred by the Statute of Limitations. Further, even on the basis of the Affidavits, produced by Plaintiff in opposition to the Motion, there were fact questions involving state of mind and intent of the parties, and the reasonable inferences from those facts showed that there was either "fraudulent concealment of the accrual of Plaintiff's right of action," or "estoppel" of the Defendants under Pennsylvania law to plead the Statute of Limitations.

(i) It was pointed out under Statement that there was no formal vote or resolution, or ordinance by the Supervisors at its January 7, 1967 meeting, at which allegedly Plaintiff was "discharged," or dismissed. The Pennsylvania Statute in 53 P. S. 65512 states: " . . . Except as otherwise provided in this Act, an affirmative vote, of a majority of the entire Board of Supervisors shall be necessary in order to transact any business." (Appendix E 12a) Local governments in Pennsylvania, in carrying out their powers and duties in most instances have to pass a resolution or ordinance. Under 53 P. S. 65741 (Appendix F 13a) it states: "To adopt ordinances prescribing the manner in which such specific powers of the township shall be carried out." Even Judge Kramer, in the Pennsylvania Commonwealth Court Opinion, said:

"No formal resolution of dismissal was passed by the Township Supervisors." (*Yatzor v. Showman, et al*, 5 Commonwealth Court 291, at 293, (290 A2d 425) Under Statement it was also pointed out that it was the custom and practice of the Township to continue their employees from year to year without formal vote thereon, and Plaintiff had been hired for an indefinite term of office, which was admitted by the Township Solicitor in his Opinion. Also, it was pointed out that there was never any motion, resolution or ordinance, either rehiring all the other township employees or dismissing any of them at this meeting of January 7, 1967, at which and by which Defendants claim that Plaintiff was let go.

Here Petitioner is saying that his employment was never terminated in a legally effective way under Pennsylvania law. Before it has been set forth that his employment was not "lawfully terminated" in the sense that he was not given written reasons and a hearing thereon, or any reasons whatsoever before this attempted "discharge," or dismissal or whatever the non-action of the Supervisors might be at its January 7, 1967 meeting.

As "an employment at will," or for an indefinite term, Plaintiff had a continuing contract of employment and a continuing cause of action to this very day. In *Williams vs. City of Uniontown*, 79 Pa. Superior Ct. 193, an assistant police chief employed by the Borough had no period of tenure of office that was fixed. After working about eight months when the Burgess tried to discharge him to prevent him from performing his duties, he repeatedly tendered his services which were refused by the Burgess. The Court said at pp. 194, 195: "It is conceded that the plaintiff *was never removed from his position and he never resigned*. The Court further said at page 195: " . . . the fact being admitted that he neither resigned *nor was dismissed*, the conclusion necessarily follows that he may recover his salary for as much

of the period *during which he was ready to serve* as it remained unpaid. His action is based *on a contract of employment which continued at least as long as the time for which he claims compensation.*" The Court further said at page 195, "*The plaintiff's injury arose from the failure of the employer to pay the wages agreed on.*" (emphasis supplied)

In *Storm v. City of Scranton*, 77 Pa. Sup. 283, the Court held a fireman can only be dismissed by consent or after decision of a trial by Court, or trial board under the particular laws of Pennsylvania. Court held that in the absence of any evidence of such dismissal, an employee who was ready to give his services to the City can recover the salary for the position to which he was appointed. The Court said the only question in dispute was *whether he had been dismissed by any person who had authority* to dismiss him and not whether he had been illegally dismissed for insufficient cause. The Court held that as no evidence was produced which warranted a finding that he had been notified he had been dismissed in a manner provided by the State law, the Court didn't err in allowing him recovery of his salary. Allocatur was refused in this case by the Pennsylvania Supreme Court. The cases of *Williams* (Supra) and *Storm* (Supra) have been for many years and are still the law of Pennsylvania to the effect that when an employee has been wrongfully discharged he may treat the contract as existing and sue for a salary as it becomes due, his readiness to serve being considered as actual service. Also, Pennsylvania recognizes the principle that under such circumstances the employment contract is considered to be a continuing contract and as giving a continuing cause of action. This view of Pennsylvania law was recognized and upheld in *Lubriko Co. v. Wyman*, 290 Fed. Rep. 12 (C. C. A. – 3d). This rule is known as the doctrine of "constructive service." Under this rule of Pennsylvania law alone the Statute of Limitations hadn't run at the time suit was filed July 6, 1973 even considering the non-action of the Supervisors at the January

7, 1967 meeting. Plaintiff's Complaint alleged that he was ready, willing and able to serve after January 7, 1967 as did his opposition affidavit as filed. Even if as Judge Weber said: "It is apparent that as of August 3, 1967, Plaintiff realized that efforts of conciliation and compromise were unavailing . . . " so that the Court found that the statute or cause of action accrued on that date, Plaintiff's Complaint was not barred when it was filed on July 6, 1973, being within 6 years.

The Court Below also misinterpreted and misapplied important questions of Pennsylvania law and decisions pertaining to the averments of Plaintiff of "estoppel," and/or "*fraudulent concealment* of *the accrual* of Plaintiff's cause of action" under Pennsylvania law. If there were such promises, statements, or actions or facts such as these that constitute "estoppel" or "fraudulent concealment of the accrual of Plaintiff's cause of action," the action is not barred. In the case of estoppel in effect the Courts hold that the statute is tolled or suspended from running during the period that the estoppel is operative on the Plaintiff. In fraudulent concealment, *the statute doesn't start to run* until either Plaintiff knows or should have known by the exercise of reasonable diligence, that his cause of action accrued. In the *Semaan case* (Supra) — D. C. C.C.A., Judge Bazelon reversed Summary Judgment, saying it was error to deny Plaintiff employee the opportunity of proving facts which would constitute an estoppel, where he was led by a course of conduct to believe his employment was permanent. In the *Longo case* (Supra) (C.C.A. — 3d) Judge Hastie reversed Summary Judgment on the basis of Statute of Limitations, as the record showed a need to try *disputed factual issues* whether or not Defendants conduct constituted "estoppel" from asserting that defense. In that case, as in the case at bar, Plaintiff was asked not to sue as the case would be settled. In *Guy v. Stoecklein Baking Company, et al.*, 133 Pa. Superior 38, 1AT2d, 839, Defendants statement and conduct created an estoppel to raise the Statute of Limitations

the Court holding that the compensation claimant had one year from the time of the promise of the Defendant to file his claim petition.

In brief, in these cases of "estoppel" under Pennsylvania law, it appears that where a cause of action has started to run and before it runs out if reliance by Plaintiff on promises and conduct of Defendant causes him to let the statute run out, the Court in Pennsylvania will permit the Plaintiff to still file suit. In the Pennsylvania doctrine of "fraudulent concealment of the accrual of the right of action," in these cases would appear that because of such concealment, *the Statute doesn't begin to run at all until the Plaintiff knows or should know* by the exercise of reasonable diligence what is happening. *In short, this period of "fraudulent concealment" is added to what would otherwise be the applicable statute of limitations,* which in this case at bar Judge Weber has decided is six years as being in the nature of a contract action.

As was pointed out in the *Baker case* (Supra) (C. A. 7) the touchstone in determining whether the cause of action is a continuing one is *the nature and extent of Defendants behavior and not the duration of Plaintiffs injury."* In *Haefele v. Davis,* 399 Pa. 504, 160 At. 2d 711 (1970), the Appellate Court approved of the Lower Court treating *the conduct of the defendant as of a continuing nature* on the question of whether or not the Statute of Limitations barred the action, which it was held it did not.

Judge Weber misinterpreted Pennsylvania law as to "estoppel," and either wholly overlooked or disregarded Pennsylvania law concerning the principle of "fraudulent concealment of the cause of action or accrual of the right of action" of Plaintiff, as it applied to the facts of this case. In the transcript of the hearing before the District Court on September 5, 1973, the Court stated: ". . . that if ON THE DAY BEFORE the end of the Statute of Limitations, the day

before the statute barred the action, there was *not at that* TIME *the pressure or the undue influence or the other things that create an estoppel, then I don't believe the estoppel works.*" (emphasis supplied) This interpretation is further evidenced in the Court's Opinion: "Furthermore we can find no evidentiary support for any contention that the Plaintiff was misled into a failure to file the present cause of action by any representations made to the defendants after the final determination of the State Court of Appeals on July 7, 1972." (App.C 7a) Petitioner contended under Pennsylvania law where there is a concealment of "accrual of the cause of action," this tolls or prevents the Statute of Limitations *from beginning to run* until either the accrual of the right of action *is discovered or should have been discovered by the exercise of reasonable diligence.* Assuming arguendo that the starting date would have been January 7, 1967, the date of no action by the Supervisors, because of the "fraudulent concealment of the right of action" the Statute of Limitations did not begin to run until the very earliest, on April 6, 1968, when the Solicitor's Opinion was read at the township meeting and it was stated: "The Board agrees to it." Therefore, his action filed July 6, 1973 was well within the six year period.

In *Schwab v. Cornell*, 306 Pa. 536, 539, 160 A.449, 450, the Court said: "If the circumstances are such that a man's eyes should have been open to what is occurring, then the statute begins to run from the time when he could have seen, *but if by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises.*" (emphasis supplied). The *Schwab case* (Supra) is cited in *Walters vs. Ditzler*, 424 Pa. 445, 227 A.2d 833, at page 449: "The fraud which will toll the statute and effect an estoppel *need not be fraud in the strictest sense*, i.e., *inclusive of an intent to deceive, but may be fraud in the broad sense*, i.e., *inclusive of*

unintentional deception." The Walters Opinion (Supra) further stated at 457 . . . "It is not the intention of the other party estopped *but the natural effect upon the other party* which gives vitality to an estoppel." (emphasis supplied)

In *Deemer v. Weaver,* 324 Pa. 85, 187 A.215, 216, the Court said at page 88: " . . . that mere silence or concealment does not toll the running of the statute, but that when the wrongdoer adds to his original fraud affirmative efforts to divert, mislead or prevent discovery, *he gives to his original fraudulent act a continuing character which deprives it of the protection of the statute* . . . If by any act of concealment or deceit, whether before or at the same time or after the act is committed, the wrongdoer hides from the innocent party the facts which would put him upon inquiry, the statute does not begin to run . . . ": (Citing cases)"

These Pennsylvania cases on fraudulent concealment emphasize that the Lower Court either misinterpreted or overlooked this important State question and law in conflict with applicable Pennsylvania law and long established law, to the great detriment of Petitioner.

It will be recalled that under Statement, it is pointed out that some of Defendant Supervisors from shortly after March, 1967 up to April 6, 1968, at least several times asked the Plaintiff to hold off all legal proceedings as they were confident that the matter would be worked out whereby he would be continued as Chief of Police. It was further pointed out that even up to about May, 1970, there were numerous discussions and negotiations between Plaintiff's counsel and Defendants' Solicitor to work out an amicable settlement of this matter. If the Supervisors decided before the January 7, 1967 meeting not to continue Plaintiff in their employ and not to give him any reasons for a hearing thereon and remained silent, but made him "relax his vigilance," or hid from Plaintiff the innocent party "the facts which would put him on inquiry, the Statute does not begin to run" (Deemer

case, Supra) until the earliest, from the April 6, 1968 meeting when for the first time Plaintiff was informed that the Solicitor's Opinion was approved to the effect his employment was at will and could be terminated at any time, and for any reason. Even if this were "unintentional deception" as in the Walters case, (Supra) it still was legally effective under Pennsylvania law to prevent the Statute of Limitations from starting to run, because Plaintiff's cause of action and right of action did not accrue until after he had made demand for his rights and they had been refused which was at this April 6, 1968 meeting. It should be noted that even at that meeting in the Minutes it did not appear that they would never give him written reasons or a hearing thereon.

3. WHETHER THE COURT BELOW ERRED IN DENYING PETITIONER THE RIGHT TO TAKE DEPOSITIONS ON ALL OR SOME OF THE ISSUES OF FACT SET FORTH ABOVE, BEFORE CONSIDERING AND DECIDING IF THERE WERE A GENUINE ISSUE OF ANY MATERIAL FACT, AND BY DECIDING DISPUTED QUESTIONS OF MATERIAL FACT, DEPRIVING HIM OF HIS DAY IN COURT.

Actually, this question has been discussed heretofore in respect to the other questions. There certainly are many questions of material fact involved in all these principles mentioned and issues in this case. There are questions involving intent, state of mind in the questions of whether or not Petitioner's employment was ever terminated, whether he had a continuing contract of employment and therefore a continuing cause of action and if there were estoppel and/or fraudulent concealment of his right of action. This information, of course, would be mostly in the exclusive possession and control of the Defendants and couldn't really be found out other than by depositions, which were denied. In considering such a motion, the burden is on the movant of clearly establishing the lack of *any triable issue of fact* by the record properly before the Court. Also, all facts and in-

ferences therefrom are to be viewed in the light most favorable to non-movant and all doubts are to be resolved against the motion. It appears that the exact opposite principles were applied in this case. The Third Circuits view of the extremely limited circumstances in which summary judgment may appropriately be entered was set forth in *Bragen v. Hudson County News Company, Inc.*, (278 F.2d 615, 3 Cir.,) when at page 618, the Court found that the District Court erred in that "it 'decided' factual issues which went to the heart of the litigation." The Circuit Court went on to say *"The impact of particular circumstances upon an inference arising from an admittedly existing factual situation calls for a factual determination which is the function of the trier of facts and not that of the court* in disposing of a motion for summary judgment. See *Gray Tool Co. v. Humble Oil Refining Co.*, 5 Cir., 1951, 186 F.2d 365, 367, cert[iorari] denied, 341 U. S. 934, [71 S.Ct. 854 95 L.Ed. 1363], where it was held, that *'A judge may not on motion for summary judgment, draw fact inferences ° ° ° such inferences may be drawn only on a trial'."* (emphasis supplied) In the instant case the Third Circuit certainly did not apply its own rule.

In *S. J. Groves & Sons Co. v. Ohio Turnpike Comm'n*, C. A. 6th, 1963, 315 F.2d 235, 237-238 (per Miller, J.), certiorari denied 84 S.Ct. 65, 375 U. S. 824, 11 L.Ed. 2d 57, the Court said, "It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the *inferences to be drawn* from these facts, *what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights adn ued to exist should be drawn from such facts.* Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment." (emphasis supplied)

The basic rights of an honest, conscientous Police Chief have been violated in this case.

Conclusion

For the above reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeal.

Respectfully submitted,

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and

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1024

MIKE YATZOR,

Appellant

v.

HERBERT ALLEN, *et al.*,

Appellees.

(WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 73-63 ERIE)

Submitted Under Third Circuit Rule 12(6).
Before SEITZ, *Chief Judge*,
GIBBONS and GARTH, *Circuit Judges*.
September 3, 1974

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

COLLINS J. SEITZ
Chief Judge

ATTEST:

THOMAS F. QUINN
Clerk

Dated: September 4, 1974

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1024

MIKE YATZOR,

Appellant

HERBERT ALLEN, *et al.*
(WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 73-63 ERIE)

SUR PETITION FOR REHEARING

GIBBONS and GARTH, *Circuit Judges.*
VAN DUSEN, ALDISERT, ADAMS, GIBBONS,
ROSENN, HUNTER, WEIS, and GARTH, *Circuit Judges.*

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

COLLINS J. SEITZ
Chief Judge

Dated: September 26, 1974

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MIKE YATZOR

Plaintiff

vs.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, all individually and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, individually, and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA.

Defendants

Civil Action No. 73-63 ERIE

OPINION

WEBER, J. *November 8, 1973*

Plaintiff has filed an action alleging jurisdiction under the Civil Rights Acts[1] on a cause of action arising out of his dismissal from the post of part-time police officer in Washington Township, Erie County, Pennsylvania. The defendants have moved to dismiss on various grounds, the one presently before us being the bar of the statute of limitations. Because the moving parties presented evidentiary material with their motion we considered the motion to dismiss as one for summary judgment under Fed. R. Civ. P. 56 and allowed the plaintiff additional time to present evidentiary material in opposition to the motion to dismiss.

There is no dispute between the parties that the Pennsylvania six year statute of limitations for actions in assumpsit

[1] 28 U.S.C. 2201 et seq. is not a grant of jurisdiction but merely provides for a remedy of declaratory judgment on cause of action within the court's jurisdiction.

[12 P.S. 31] would govern this cause of action because plaintiff's claim is basically a claim for unlawful termination of his contract of employment. Actions in federal court under the Civil Rights Acts are governed by the statute of limitations of the state on the most analogous cause of action. *Henig v. Odorioso*, 385 F.2d 491 [3rd Cir. 1967].

The controlling chronology is as follows:

On April 7, 1972 plaintiff was hired by the Township as a part-time police officer. He was the sole police officer employed by the township and was designated Chief of Police. Compensation was at first on an hourly basis and after 1965 at a salary of $100 per month. On January 7, 1967, the first meeting of the Township Supervisors for the year 1967, the plaintiff rendered his police report and stated, being the first month of the year, it would be necessary to move to renew for his services for the year 1967. The minutes of the meeting of the Township Supervisors reflect "no action taken and so notified." He was informed that his services were no longer needed. Plaintiff was not paid thereafter. There was considerable negotiation between his attorney and the Township Supervisors and its Solicitor over the question of his employment. On March 21, 1967, plaintiff's attorney wrote and asked the Township that a written statement of charges against plaintiff be furnished and that a hearing be given him before the Supervisors. On August 3, 1967, plaintiff filed an action in the Court of Common Pleas of Erie County, Pennsylvania, at No. 596 September Term, 1967, based on the Police Tenure Act, 53 P.S. 811. The action continued in the Court of Common Pleas until May 15, 1970 when it was dismissed by opinion and order of that Court. Thereafter, a series of appeals to the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania were pursued, finally, concluding in an Opinion and Judgment against the plaintiff on the merits by the Commonwealth Court on April 27, 1972, and a refusal of allocatur by the Supreme Court of Pennsylvania on July 7,

1972. See *Yatzor v. Raymond Showman, et al. Commissioners of Washington Twp.*, 5 Cmwlth. Ct. 291, 290 A.2d 425 [April 27, 1972].

The present action in this court was filed July 27, 1973.

It would appear that the first action which damaged the complaining party was the failure of the Township Supervisors to pass the resolution renewing his employment on January 7, 1967. He was not paid thereafter and he and his attorney continued to make representations to the Township Supervisors about the renewal of his employment which produced no action satisfactory to the plaintiff and resulted in the filing of the state court action on August 3, 1967. The complaint in the state court action recites:

> "VII. *That on January 7, 1967, the said defendants Herbert Allen and Glenn Shields, advised your petitioner that neither he nor his services were needed any longer and that he was through.*"

The complaint filed in the state court further alleges:

> "XIII. *That your petitioner was illegally removed from his position as Chief of Police.*"

It is apparent that as of August 3, 1967 the Plaintiff realized that his employment had been terminated as of January 7, 1967, and that efforts at conciliation or compromise were unavailing and that he was required to resort to the courts for any remedy that might be available.

We have given the plaintiff every opportunity to produce evidentiary materials showing that there is a genuine issue of material fact with respect to the defense of the statute of limitations raised by the defendants. After the initial hearing on the motion to dismiss we allowed further time for discovery and production of documents on this issue. We did not allow the plaintiff to conduct depositions of parties defendant or witnesses because we were of the opinion that

the existence of a genuine issue of material fact could be established by affidavits or other documentary material. Plaintiff's burden in this respect is not great and the existence of evidence which would show a genuine issue of material fact as to the statute of limitations can clearly be established by affidavits of knowledgeable parties if such evidence exists. The plaintiff has now produced supplemental and additional affidavits and a supplemental brief devoted solely to the issue of the statute of limitations.

The plaintiff attempts to show by his supplementary affidavits and to argue in his brief that the statute of limitations could not have started to run against him on January 7, 1967 because the failure to continue his employment on and after that date was not proper under the statutes of the Commonwealth of Pennsylvania and that, therefore, no discharge from employment took place at that date. However, this was the subject of the litigation in the courts of Pennsylvania which was ultimately decided against the present plaintiff. He was aware in 1967 that the Supervisors of Washington Township no longer considered him to be employed and he no longer received his compensation. He alleged in the complaint filed in the Court of Common Pleas that he had been illegally discharged on January 7, 1967. The state court litigation continued from August 3, 1967 until the final refusal of allocatur by the Pennsylvania Supreme Court on July 7, 1972. Plaintiff was aware at that time that he had no further possibility of relief from the state courts and if he had any cause of action in this court he would have until January 7, 1973 to file any complaint on that cause of action. He filed the present complaint on July 6, 1973, six months after the expiration of the statute of limitations on a cause of action that arose on January 7, 1967.

The plaintiff avers that since he was never properly discharged he has a continuing cause of action for back pay for each and every month that he had been deprived of

employment and compensation from January 7, 1967 until the present date. We find this argument untenable in that plaintiff's cause of action accrued at the time when a particular act was done which caused him damage. *Auld v. Mobay Chemical Co.*, 300 F. Supp. 138 [W.D. Pa. 1969]. This act has been established by the evidentiary materials to have occurred on January 7, 1967 and the plaintiff recognized this was so in his pleading filed in the state court action.

Plaintiff argues that his cause of action was concealed from him by actions of the defendants and that therefore they are estopped to plead the statute of limitations during this period of concealment. However, we again regard the institution of the state court action in August 1967 as conclusive evidence that the plaintiff was aware of the actions and the position of the defendants and of his inability to effect any settlement with them over this dispute without recourse to a law suit. All during this period plaintiff was represented by counsel who were prosecuting his state action and its various appeals.

Another contention of the plaintiff in response to the defense of the statute of limitation is that representations were made to the plaintiff and to his counsel over a considerable period of time that an amicable settlement of the matter might be reached and that he relied upon these representations in failing to file the present action before the statute of limitations expired. Again we find this completely untenable in that the plaintiff did not delay in taking legal action but on the contrary began his lawsuit contesting the legality of the termination of his employment on August 3, 1967, within eight months of the dismissal. Furthermore, we can find no evidentiary support for any contention that the plaintiff was misled into a failure to file the present cause of action by any representations made by the defendants after the final termination of his state court appeals on July 7, 1972. All of the supplementary affidavits filed by plaintiff after the initial argument on this motion refer to negotiations for set-

tlement up to the time of the decision of the Court of Common Pleas of Erie County on May 15, 1970. Even after the exhaustion of all rights of appeal plaintiff still had six months within which to file the present cause of action in this court before the bar of the statute of limitations. There is no support in any evidentiary material that he was further impeded in the filing of this suit. Actually, his complaint was not filed in this court until July 6, 1973, almost one year from the date of final dismissal of his state court appeals.

"[T] *he mere pendency of . . . negotiations for the adjustment of a controversy does not toll the statute of limitations.*"

Clifton Products Inc. v. United States
169 F. Supp. 511, 513 [Ct. Cl. 1959].

"[T] *the statute of limitations is not tolled by attempts to obtain . . . relief through . . . negotiation.*"

Fattore v. United States
312 F.2d 797, 800 [Ct. Cl. 1963].

"The Statute of Limitations in Pennsylvania is only tolled by active and continuing fraud concealed by the perpetrator thereof until the victim knows or has reason to know or investigate the circumstances. *Rush v. Butler Fair & Agricultural Assoc.*, 391 Pa. 181, 137 A.2d 245 [1957]; *Federal Dep. Ins. Corp. v. Ciaffoni*, 176 Pa. Super. 91, 107 A.2d 211 [1954]. Mere mistake, misunderstanding, or lack of knowledge is insufficient to toll the running of the statute. *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267 [1963]."

Iacaponi v. New Amsterdam Casualty Co.
258 F. Supp. 880, 883, 884
[W.D. Pa. 1966], affd. 379 F. 2d 311
[3rd Cir. 1967].

"Counsel for plaintiffs has not cited, nor has the court's research disclosed, any Pennsylvania authority to support the contention that the limitation period commenced to run only after the termination of efforts to remedy the claimed defect."

Smith v. American Flange and Manufacturing Co.
139 F. Supp. 917, 919, 920
[S.D. N.Y. 1956].

The plaintiff has supplied the court with a great mass of evidentiary materials and a very extensive brief attempting to show why the bar of the statute of limitations should not be applied against him but we can find nothing in any of the evidentiary material that produces a genuine issue of material fact on the question of the bar of the statute of limitations.

ORDER

Now, this 8th day of November, 1973, this case having come before the court on a motion to dismiss under Fed. R. Civ. P. 12, and the court having been required to consider evidentiary materials the motion is treated as a Motion for Summary Judgment under Fed. R. Civ. P. 56, and having considered the evidentiary materials, and arguments and briefs of counsel, the court finds that there is no genuine issue of material fact as to the bar of the statute of limitations. It is, therefore,

ORDERED that the Motion of Defendants to Dismiss be GRANTED and that Plaintiff's action is hereby ORDERED DISMISSED, with prejudice, because it is barred by the applicable statute of limitations.

GERALD J. WEBER
United States District Judge

cc: Jerome Hahn, Esq.
211 Washington Trust Bldg.
Washington, Pa. 15301

John G. Gent, Esq.
James F. Toohey, Esq.
1415 Baldwin Bldg.
Erie, Pa. 16501

APPENDIX D

Removal of Policemen in Certain Boroughs and Townships

53 P.S. § 811. APPLICATION OF LAW

This act[1] shall apply to each township of the second class, to each borough and township of the first class having a police force of less than three members and not subject to sections one thousand one hundred sixty-five through one thousand one hundred ninety of the act, approved the fourth day of May, one thousand nine hundred twenty-seven (Pamphlet Laws 519), known as "The Borough Code",[2] and their amendments, nor to sections six hundred twenty-five through six hundred fifty of the act, approved the twenty-fourth day of June, one thousand nine hundred thirty-one (Pamphlet Laws 1206), know as "The First Class Township Code",[3] and their amendments. 1951, June 15, P.L. 586, § 1.

§ 812. REMOVALS

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act, with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case[4] the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall

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[1] Sections 811-815 of this title.

[2] Sections 46165-46190 of this title.

[3] Sections 55625-56650 of this title.

[4] Enrolled bill reads "cases."

not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed. As amended 1961, June 14, P.L. 348, § 1; 1965, July 19, P.L. 219, § 1.

§ 814. Hearings on Dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed. 1951, June 15, P.L. 586, § 4.

§ 815. Appeal

The suspended or dismissed employe shall have the right to appeal to the court of common pleas of the county in which he was employed. 1951, June 12, P.L. 586, § 5.

APPENDIX E —*Township Law*

Municipal Corp.

53 P.S. § 65512. MONTHLY MEETINGS; QUORUM, RENT AND EXPENSES

The township supervisors shall meet for the transaction of business at least once each month, at a time and place to be fixed by the board, but they shall not be paid for more than sixteen meetings in any one year, except in any township where, on account of the exercise of governmental functions other than those relating to roads, more meetings are necessary, in which case, the number of meetings for which the supervisors may be paid may be increased to any number, not exceeding twenty-four in any year, in townships having a population of five thousand or less, and in townships having more than five thousand population not exceeding fifty meetings in any year. Two members of any board of supervisors consisting of three members shall constitute a quorum and three members of any board of supervisors consisting of five members shall constitute a quorum. Except as otherwise provided in this act, an affirmative vote of a majority of the entire board of supervisors shall be necessary in order to transact any business. Necessary expenses incurred in such meetings, including office rent, stationery, light and fuel, shall be paid of the general township fund. As amended 1961, Sept. 22, P.L. 1594, § 1; 1963, April 23, P.L. 19, § 1; 1965, Sept. 2, P.L. 481, § 1.

APPENDIX F

Municipal Corp. —*Township Law*

53 P.S. § 65741. ORDINANCES

To adopt ordinances prescribing the manner in which such specific powers of the township shall be carried out. All such ordinances, unless otherwise provided by law, shall be published not more than sixty days nor less than seven days prior to passage at least once in one newspaper circulating generally in the township. Such ordinances shall be recorded in the ordinance book of the township and shall become effective five days after such adoption. Any and all township ordinances, or portions thereof, the text of which, prior to the effective date of this amendment, shall have been attached to the township ordinance book, shall be considered in force just as if such ordinances, or portions thereof, had been recorded directly upon the pages of such ordinance book: Provided, That all other requirements of this act applicable to the enactment approval, advertising and recording of such ordinances, or portions thereof, were complied with within the time limits prescribed by this act. In any case in which maps, plans, or drawings of any kind are adopted as part of an ordinance, the supervisors may, instead of publishing the same as part of the ordinance, refer in publishing the ordinance to the place where such maps, plans, or drawings are on file and may be examined. The board of supervisors may prescribe fines and penalties not exceeding three hundred dollars in any instance for the violation of any such township ordinances, which fines and penalties may be collected by suit or summary proceeding brought in the name of the township before any justice of the peace. Proceedings for the violation of township ordinances and for the collection of fines and penalties imposed thereby may be commenced by warrant, or by summons, at the discretion of the justice of the peace before whom the proceeding is begun. No warrant shall be issued, except

upon complaint on oath or affirmation specifying the ordinance for the violation of which the same is issued. All proceedings shall be directed to, and be served by, a constable of the township. Warrants shall be returnable forthwith and upon such return like proceeding shall be had, as in cases of summary conviction. All fines and penalties collected for the violation of township ordinances shall be paid over to the township treasury. Upon judgment against any person by summary conviction, or by proceedings by summons on default of the payment of the fine or penalty imposed and the costs, the defendant may be sentenced and committed to the township lockup for a period not exceeding five days, or to the county jail, or workhouse for a period not exceeding thirty days.

Any person aggrieved may, within thirty days after any ordinance or resolution takes effect, make complaint as to the legality of such ordinance or resolution to the court of quarter sessions upon entering into recognizance with sufficient surety to prosecute the same with effect, and for the payment of costs. The determination and order of the court thereon shall be conclusive. As amended 1961, June 19, P.L. 486, § 1; 1963, June 6, P.L. 73, § 1.

APPENDIX G

Police Civil Service, Incorporated Towns

53 P.S. § 53270. REMOVALS, SUSPENSION OR REDUCTION IN RANK

No person employed in any police department of any political subdivision shall be suspended, removed or reduced in rank, except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which cases the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violation of any law of this Commonwealth which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders or conduct unbecoming an officer; (5) intoxication while on duty; (6) engaging[1] or participating[2] in the conducting of any political or election campaign otherwise than to exercise his own right of suffrage. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

If for reasons of economy or other reasons it shall be deemed necessary by any municipality to reduce the number of paid employes of the police department, then such political subdivision shall apply the following procedure: (a) if there are any employes eligible for retirement under the terms of any retirement or pension law, then such reduction in numbers shall be made by retirement if the party to be retired is sixty-five years of age or over; (b) if the number of paid employes in the police force eligible to retirement is insufficient to effect the necessary reduction in numbers, or if there are no persons eligible for retirement, or if no retirements or pension fund exist, then the reduction shall be effected[3] by furloughing the man or men, in-

cluding probationers last appointed to said police force. Such removal shall be accomplished by furloughing in numerical order, commencing with the man last appointed until such reduction shall have been accomplished. In the event the said police force shall again be increased the employes furloughed shall be reinstated in the order of their seniority in the service. 1941, June 5, P.L. 84, § 20.

Repealed in Part

Repealed as to boroughs, by act 1947, July 10, P.L. 1621, § 95; and as to townships of first class by act 1949, May 27, P.L. 1955, § 64.

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[1] Enrolled bill reads "engage."
[2] Enrolled bill reads "participate."
[3] Enrolled bill reads "affected."

APPENDIX H

Police Civil Service
Incorporated Towns

53 P.S. § 53271. HEARINGS ON DISMISSAL AND REDUCTION; APPEAL; COUNSEL

If the person sought to be suspended, removed or reduced in rank shall demand a hearing by the commission, the demand shall be made to the commission. Such person may make written answers to any charges filed against him. The commission shall grant him a hearing which shall be held within a period of ten days from the filing of charges in writing and written answers thereto filed within five days and may be continued by the commission for cause, or at the request of the accused. At any such hearing the person against whom the charges are made may be present in person and by counsel. The appointing officer or body may suspend any such person without pay pending the determination of the charges against him, but in the event the commission fails to uphold the charges then the person sought to be suspended, removed or demoted shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record.

A written record of all testimony taken at such hearings shall be filed with and preserved by the commission, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

In the event the commission shall sustain the charges and order the suspension, removal or reduction in rank, the person suspended, removed or reduced in rank shall have immediate right of appeal to the court of common pleas of the county, and the case there determined as the court deems proper. No order of suspension made by the commission shall be for a longer period than one year. Such appeal shall

be taken within sixty days from the date of entry by the commission of its final order and shall be by petition. Upon such appeal being taken and docketed, the court of common pleas shall fix a day for a hearing and shall proceed to hear the appeal on the original record, and such additional proof or testimony as the person sought to be suspended, removed or reduced in rank may desire to offer in evidence shall be permitted to be introduced. The decision of the court affirming or reversing the decision of the commission shall be final, and the employe shall be suspended, discharged, demoted or reinstated in accordance with the order of the court.

The appointing officer or body and the person sought to be suspended, removed or demoted shall at all times have the right to employ counsel before the commission and upon appeal to the court of common pleas. 1941, June 5, P.L. 84, § 21.

Repealed in Part

Repealed as to boroughs, by act 1947, July 10, P.L. 1621, § 95; and as to townships of first class by act 1949, May 27, P.L. 1955, § 64.

APPENDIX I

Civil Service Borough Code

53 P.S. § 46190. REMOVALS

No person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for the following reasons:

(1) Physical or mental disability affecting his ability to continue in service, in which cases the person shall receive an honorable discharge from service.

(2) Neglect or violation of any official duty.

(3) Violation of any law which provided that such violation constitutes a misdemeanor or felony.

(4) Inefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer.

(5) Intoxication while on duty.

(6) Engaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage.

A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

If for reasons of economy or other reasons it shall be deemed necessary by any borough to reduce the number of paid employes of the police or fire force, then such borough shall apply the following procedure: (i) if there are any employes eligible for retirement under the terms of any retirement or pension law, then such reduction in numbers shall be made by retirement of such employes, starting with the oldest employee and following in order of age respectively, (ii) if the number of paid employes in the police force

eligible to retirement is insufficient to effect the necessar reduction in numbers, or if there are no persons eligible fc retirement, or if no retirement or pension fund exists, the the reduction shall be effected by furloughing the man o men, including probationers, last appointed to the respec tive force. Such removal shall be accomplished by furlough ing in numerical order commencing with the man las appointed until such reduction shall have been accom plished. In the event the said polic force shall again be in creased the employes furloughed shall be reinstated in th order of their seniority in the service. 1966, Feb. 1, P.L (1965) , No. 581, § 1190.

APPENDIX J

Borough Code, Civil Service

53 P.S. § 46191. HEARINGS ON DISMISSALS AND REDUCTIONS

If the person suspended, removed or reduced in rank shall demand a hearing by the commission, the demand shall be made to the commission. Such person may make written answers to any charges filed against him not later than the day fixed for hearing. The commission[1] shall grant him a hearing which shall be held within a period of ten days from the filing of charges in writing, unless continued by the commission for cause at the request of the council or the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The council may suspend any such person, without pay, pending the determination of the charges against him, but in the event the commission fails to uphold the charges, then the person sought to be suspended, removed or demoted shall be reinstated with full pay for the period during which he was suspended, removed or demoted, and no charges shall be officially recorded against his record. A stenographic record of all testimony taken at such hearings shall be filed with, and preserved by, the commission, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

All parties concerned shall have immediate right of appeal to the court of common pleas of the county, and the case shall there be determined as the court deems proper. No order of suspension made by the commission shall be for a longer period than one year. Such appeal shall be taken within sixty days from the date of entry by the commission of its final order and shall be by petition. Upon such appeal being taken and docketed, the court of common pleas shall fix a day for a hearing and shall proceed to hear the appeal

on the original record and such additional proof or testimony as the parties concerned may desire to offer in evidence. The decision of the court affirming or revising the decision of the commission shall be final, and the employe shall be suspended, discharged, demoted or reinstated in accordance with the order of court.

The council and the person sought to be suspended, removed or demoted shall at all times have the right to employ counsel before the commission and upon appeal to the court of common pleas. As amended 1971, June 3, P.L. —, No. 6, § 1 (§ 509(a) (174).

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[1] Enrolled bill reads "commission."

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED

October Term, 1974

No. 74-803

MIKE YATZOR, *Petitioner*

v.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, *all individually and as Supervisors of* WASHINGTON TOWNSHIP, ERIE COUNTY PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, *individually and as Supervisors of* WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

October Term, 1974

No.

MIKE YATZOR, *Petitioner*

v.

HERBERT ALLEN, *et al.*, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION

On April 7, 1962, Petitioner, Mike Yatzor, was employed by the Supervisors of Washington Township, Erie County, Pennsylvania as a Township policeman. At the first meeting of each calendar year commencing in January, 1963, Yatzor's employment was continued for each such calendar year by the Township Supervisors, until the year 1967. At a meeting held on January 7, 1967, Yatzor's employment was discussed by the Supervisors. His employment was not renewed, and Yatzor was so informed. On March 21, 1967, Yatzor's retained counsel, Joseph Walsh, notified the Supervisors that he was aware that Yatzor had been relieved of his duties by the Supervisors on January 7, 1967, and that he intended to take legal action if the matter was not resolved. On August 3, 1967, Yatzor filed

a "Petition for Appeal" in the Court of Common Pleas of Erie County, Pennsylvania, stating that the Supervisors refused to answer his inquiry, refused to give him a statement in writing as to the charges against him, and refused him a hearing. From August 3, 1967 until July 7, 1972, Yatzor unsuccessfully pursued his state court remedies. On July 7, 1972, the Supreme Court of Pennsylvania refused Yatzor's petition for allocatur from the Superior Court of Pennsylvania, thus terminating the state court proceedings. Yatzor did not appeal that decision to this Court.

On July 3, 1973, Yatzor filed his complaint in the United States District Court for the Western District of Pennsylvania under the Civil Rights Act, 42 U.S.C. §§1983, 1985, 1986 and 28 U.S.C. 1343. Petitioner asserted alleged violations of due process and equal protection under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. The Township Supervisors filed a motion to dismiss the action on the grounds that it was barred by the six year Pennsylvania statute of limitations which commenced on January 7, 1967, when Yatzor's employment was terminated. The District Court entered an order and opinion on November 8, 1973, granting the Supervisors' motion to dismiss which was treated as a motion for summary judgment.

After the District Court dismissed the plaintiff's complaint and action with prejudice on November 8, 1973, for reasons which appear more fully in the decision of the District Court (Petitioner's Appendix C), Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court. Petitioner then filed for a petition for rehearing, which was denied by the Court of Appeals on September 26, 1974.

REASONS FOR DENYING WRIT

A. There is no conflict among the circuit courts of appeal concerning the decisions and order rendered in this matter by the Court of Appeals of the Third Circuit.

In affirming the order of District Judge Weber, the Third Circuit Court of Appeals concurrs with the District Court's finding that the applicable Pennsylvania statute of limitations serves to bar the Petitioner's cause of action (Appendix A, page 1A).

Petitioner concludes that August 3, 1967, the date Petitioner filed a petition for appeal in the Erie County Court of Common Pleas, is the pertinent date for purposes of computing the six (6) year statute of limitations. (Petition for Writ of Certiorari, Page 15). This conclusion was not adopted by either the District Court or the Court of Appeals.

> ". . . Plaintiff's cause of action accrued at the time when a particular act was done which caused him damage; *Auld v. Mobay Chemical Company*. This Act has been established by the evidentiary materials to have occurred on January 7, 1967, and the Plaintiff recognized this was so in his pleadings filed in the State Court action." (Opinion of the District Court, Appendix C, Page 6A).

In *Auld v. Mobay Chemical Company*, 300 F. Supp. 138 (W.D. Pa. 1969), the Court stated that the applicable statute of limitations to be applied in an action for conspiracy to deprive plaintiff of his civil rights is the state statute of limitations applicable to the substantive offense. The opinion concluded that a conspiracy was actionable when it produced an overt act which injured the complaining party and that the applicable statute of limitations runs from the commission of such an overt act.

The applicable Pennsylvania statute of limitations for the substantive offense of breach of contract (in this case

an employment contract) is six (6) years. 12 Pa. Stat. Ann. §31. Here, the overt act from which the statute of limitations began to run was the dismissal of Petitioner on January 7, 1967. To assert, as does Petitioner, that the statute of limitations did not begin to run until the date he filed suit in state court is untenable.

The cases cited by Petitioner dealing with concealment or fraud giving rise to an estoppel preventing a respondent from asserting the defense of the statute of limitations are not applicable. Yatzor was aware on January 7, 1967, that he had been dismissed. Subsequent settlement conferences between counsel for the parties do not establish fraud or estoppel sufficient to toll the statute of limitations. *Aetna Life Insurance Company v. Mayer*, 113 F.2d 974; *Iacapone v. New Amsterdam Casualty Company*, 258 F. Supp. 880, 883, 884 (W.D. Pa. 1966), *affd.* 379 F.2d 311 (3rd Cir. 1967), *cert. den.* 389 U.S. 1054, 88 S. Ct. 802, 19 L. Ed.2d 849 (1968).

The only genuine issue as to a material fact which existed with regard to the applicability of the defense of the statute of limitations was a determination of the last date on which an overt act injuring Petitioner had been committed by Respondent. The evidentiary materials established without doubt that the date of such overt act took place more than six (6) years prior to the filing of suit in the District Court.

Other circuit courts have held the state statute of limitations is applicable to determine whether the Federal action is barred. *Knowles v. Carson*, 419 F.2d 369 (5th Cir. 1969); *Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964). The decision of the Third Circuit Court of Appeals in affirming the order of the District Court, is clearly in accord with these decisions.

B. There is no conflict with applicable state law and state decisions with regard to the decision and order rendered in this matter by the Third Circuit.

The District Court held:

> "There is no dispute between the parties that the Pennsylvania six (6) year Statute of Limitations for actions in assumpsit (12 P.S. §31) would govern this cause of action because Plaintiff's claim is basically a claim for unlawful termination of his contract of employment." (Opinion of the District Court, Appendix C, Page 3A).

It does not appear from the petition for writ of certiorari that Petitioner contends that the six (6) year Pennsylvania statute is not the applicable statute of limitations. Neither does it appear that there is a genuine issue of material fact as to the occurrence of the overt act which created Petitioner's cause of action. Petitioner's discharge on January 7, 1967, was the overt act. *Helmig v. Rockwell*, 389 Pa. 21, 131 A. 2d 622 (1957), *cert. den.* 355 U.S. 832, 78 S.Ct. 46, 2 L.Ed.2d 44, *reh. den.*, 355 U.S. 885, 78 S.Ct. 146, 2 L. Ed.2d 115.

The order of the Third Circuit Court of Appeals affirming the order of the District Court is not in conflict with applicable Pennsylvania state law and state decisions. The cause of action accrued on January 7, 1967. Petitioner had until January 7, 1973, to institute suit. (12 Pa. Stat. Ann. §31). Petitioner did not file the present suit until July 3, 1973. The decision and order rendered by the Third Circuit Court of Appeals is in accordance with applicable Pennsylvania law. 12 Pa. Stat. Ann. §31; *Owen v. Western Saving Fund*, 97 Pa. 47 (1881); *Binney's Appeal*, 116 Pa. 169, 9 A.186 (1887); *Mark v. Osmer*, 138 Pa. 1, 20 A. 841 (1890).

C. The Third Circuit Court of Appeals did not decide a question of federal law.

United States Supreme Court Rule 19 (28 U.S.C.A.) sets forth various considerations governing review on certiorari. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Where a court of appeals has decided an important question of federal law, which has not been, but should be settled by the Court, the Court has sometimes reviewed the matter. U.S. Supreme Court Rule 19(b) (28 U.S.C.A.); *Yellin v. United States*, 374 U.S. 109, 83 S.Ct. 1828, 10 L. Ed.2d 778 (1963); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56, *reh. den.*, 366 U.S. 941, 81 S.Ct. 1657, 6 L.Ed.2d 852 (1961).

Petitioner admits on Page 12 of the petition that this case involves a state statute only. In effect, Petitioner has attempted to induce this Court to consider a question of state law. The most thoughtful legal analogy should not enable Petitioner to create an issue concerning a Federal question where, in fact, the Circuit Court made no decision regarding Federal Law.

D. The decision of the Third Circuit Court of Appeals in this matter is not in conflict with applicable decisions of this Court.

The District Court ordered that Petitioner's action be dismissed because it was barred by the Statute of Limitations. The Third Circuit Court of Appeals affirmed the District Court's order. Noteworthy only by their absence are any citations by Petitioner to decisions rendered by this Court, or any other court, which would be in conflict with the Decision of the District Court and the Third Circuit in this matter.

In contrast, this Court has denied petitions for writ of certiorari where the applicable state statute of limitations barred an action under the Federal Civil Rights Act. *Henig v. Odorioso*, 385 F.2d 491 (3rd Cir. 1967), *cert. den.* 390 U.S. 1016, 88 S.Ct. 1269, 20 L. Ed.2d 166, *reh. den.* 391 U.S. 929, 88 S.Ct. 1814, 20 L. Ed. 2d 671 (1968); *Gaito v. Strauss*, 368 F.2d 789 (3rd Cir. 1966); *cert. den.* 386 U.S. 977, 87 S.Ct. 1173, 18 L.Ed. 2d 139 (1967). In denying the petition for writ of certiorari, in *Henig v. Odorioso, supra*, this Court relied upon the opinion of the Third Circuit Court of Appeals:

> "Since the Civil Rights Act contains no provisions limiting the time within which an action thereunder may be brought, the applicable Statute of Limitations is that which the State would enforce had the action seeking similar relief been brought in State Court." *Id* at 493.

Petitioner is not entitled to have this Court review alleged violations of constitutional rights when in fact there exists no conflict between decisions of this Court and the decision rendered by the Third Circuit Court of Appeals.

E. Petitioner failed to raise any issue as to the unconstitutionality of the Pennsylvania Police Tenure Act in any of the proceedings in the courts of Pennsylvania and failed to exhaust all of his available state remedies.

Nowhere in the proceedings in the Pennsylvania state courts did Petitioner raise any issue concerning the unconstitutionality of the Pennsylvania Police Tenure Act, 53 Pa. Stat. Ann. §811 et. seq. In *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L. Ed. 2d 572, *on remand*, 302, N.Y.S. 2d 848, 24 N.Y.2d 1026, 259 N.E. 2d 250 (1969), this Court stated that in order to vindicate its jurisdiction to deal with the particular issue at hand, the court must inquire whether

that issue was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed the lower court. If the issue was not so presented to the state court, this Court has stated that it has no power to consider the issue. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party can affirmatively show the contrary. *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L. Ed. 3 (1945); and *Chicago, I.L.R. Co. v. McQuire*, 196 U.S. 128, 131-33, 25 S.Ct. 200, 201. 49 L.Ed. 413 (1905). "Where a Federal claim can be raised at trial, it may be forfeited by failure to make a timely assertion of the claim." *Jennings v. State of Illinois*, 72 S.Ct. 123 at 126, 342 U.S. 104, 96 L. Ed. 119.

Petitioner failed to raise any issue attacking the constitutionality of the Pennsylvania state statute in the state courts of Pennsylvania. Petitioner is not now entitled to review on that constitutional issue.

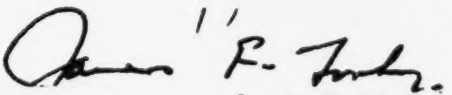
Petitioner did not appeal to this Court from the final decision of the Supreme Court of Pennsylvania denying him relief. Thus, Petitioner is not entitled to a review of the constitutionality of Pennsylvania Policy Tenure Act in the federal courts.

CONCLUSION

For the reasons as set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

By:
John G. Gent

By: 
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-803

MIKE YATZOR,

Petitioner,

vs.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, all individually and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, individually, and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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October Term, 1974

No. 74-803

MIKE YATZOR,

Petitioner,

vs.

HERBERT ALLEN, et al.,

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

We believe the Arguments presented in our Petition are fully dispositive of the issues. However, since Respondents' Brief misquotes some material facts in the Record and Petition and there is a new decision of the Court decided January 22, 1975, which is most applicable, this Reply Brief is filed.

1. PETITIONER DID RAISE AN ISSUE AS TO THE CONSTITUTIONALITY OF THE PENNSYLVANIA POLICE TENURE ACT IN ALL THE PROCEEDINGS IN THE PENNSYLVANIA COURTS, AND IS ENTITLED TO REVIEW THEREOF NOW.

A. The Federal remedy under the Civil Rights Acts is supplementary to the State remedy, and there is no need to first exhaust State remedy.

Directly contrary to the statement at page 7 and 8 of Respondent's Brief, Petitioner did raise an issue as to the constitutionality of the Pennsylvania Police Tenure Act in the proceedings in the Common Pleas Court of Erie County, and on Appeal to the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court. This was alleged in Opposing Affidavits to Respondents' Motion in Federal Court, which were filed of Record by Affidavit of Joseph M. Walsh, Jr., Esquire of Erie County, who represented Petitioner then, and in Opposition Affidavit of Louis Vaira, Esquire, who represented Petitioner in all his Appeals before the Commonwealth Court and Supreme Court of Pennsylvania, (R 153, 154; R 148-152, C.C.A. Record). The Affidavits show it was raised that it would be violative of due process under the State and Federal Constitutions for Petitioner not to be given written reasons and a Hearing thereon.

The Federal remedy is supplementary to the State remedy and the latter need not be first sought and refused before the Federal one is invoked; *Monroe v. Pape,* (1961) 365 U. S. 167, 5L. Ed. 2d 492. The Court said there 42 U. S. C. 1983 protects a right guaranteed by the Fourteenth Amendment, as well as more directly created Federal rights. Free speech has been protected thereunder. Monroe held 42 U. S. C. 1983 overrides certain kinds of state law; provides a remedy where a state law is inadequate; provides a federal remedy although a state remedy adequate in theory is not available in practice. Also, the Court's decisions have established that a plaintiff in an action under the Civil Rights Act, 42 U. S. C. Sec. 1983, is not required to exhaust state administrative remedies where the constitutional challenges is sufficiently substantial to require the convening of a three-judge court; *King v. Smith* (1968) 392 U. S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128.

Of course, in Plaintiff's Complaint in the Federal District Court as stated throughout the Petition, Petitioner is contesting the constitutionality of the Pennsylvania Police Ten-

ure Act and/or its application to him and the circumstances of the case. Further, he has contended that it would be denial of due process of law not to afford him written charges and an opportunity to be heard. In short, both in the State Courts and in the instant proceeding in the Federal Court, these constitutional questions have been raised. Petitioner is entitled to review thereof now.

2. A MOST RECENT DECISION OF THIS COURT AND OTHER DECISIONS SHOW THE THIRD CIRCUIT DECIDED THE MATTER IN CONFLICT THEREWITH, DECIDING IMPORTANT FEDERAL QUESTIONS.

A. In *Goss v. Lopez, et al.*, decided January 22, 1975, No. 73-898, the Court held that high school students suspended for misconduct for up to ten days were denied due process of law for being suspended without hearing prior to suspension or within a reasonable time thereafter. The majority opinion said, "Accordingly, a State employee who under State law, or rules promulgated by state officials, *has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge, may demand the procedural protection of due process.*" (emphasis supplied) (Page 7, Slip Opinion) The Court cites *Arnett v. Kennedy*, 416 U. S. 134 (1974) and *Goldberg vs. Kelly*, 397 U. S. 254 (1970), which were mentioned in the Petition at pages 11 through 13. The decision in *Goss* (Supra) and cases cited therein and their principles forcefully applies to the case at bar. At page 13, this Court further cited *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, that due process requires notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. Petitioner mentions the Mullane case (Supra) in citing *Bell vs. Burson*, 402 U. S. 535 (1971) at page 11 of its Petition.

On page 6 under C., Respondent misquotes that "Peti-

tioner admits on page 12 of the Petition that this case involves a state statute only." The Petition, particularly pages 10 through 15, show that both the Argument and cases cited, for the most part, have to do with other cases wherein state statutes and procedures were declared by this Court to be unconstitutional or to deny constitutional rights by the way they were applied to given fact situations. Plaintiff's Complaint and all the affidavits in Opposition to the Motion filed in the District Court clearly allege violations of Petitioner's rights under the Constitution, both State and Federal, squarely in accord with these cases and *Perry v. Sinderman*, 480 U. S. 593 (1972).

In *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. Ed. 2d 770 (1959), this Court unanimously reversed the Court of Appeals which affirmed District Court's dismissing the action on the basis that the defense of estoppel was not available against the statute of limitations contained in the Federal Employers Liability Act. This Court held it was error for the trial court to dismiss the action and decide the question of estoppel and that *whether Plaintiff could in fact make out a case calling for application of the doctrine of estoppel must await trial.* This Court said, "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar an inequitable reliance on statutes of limitations." at 232-233.

Throughout his Petition, Petitioner has set forth that he never was given express oral or written notice that he would not be given written reasons and a hearing thereon. At the most, for the first time, when the Township Solicitor's Opinion was approved at a meeting on April 6, 1968, he first learned that by inference the Supervisors thought they could let him go without any reasons (page 6, Petition). The Petition argues that the Appeals Court also decided important

State questions in direct conflict with applicable state law and state decisions, (Petition pp. 18 through 26). Petitioner pointed out that because of "estoppel" or "fraudulent concealment of the accrual of the right of action," or lack of termination of his employment in a legally effective way, the state of limitations would not begin to run until April 6, 1968 at the very earliest. (Petition page 24).

Respondent has misquoted Petitioner's Petition at page 3, in stating "Petitioner concludes that August 3, 1967, the date Petitioner filed a Petition for Appeal in the Erie County Court of Common Pleas, is the pertinent date for purposes of computing the six-year statute of limitations. (Petition, page 15)" At page 15 of the Petition, it states, "*If* Plaintiff's right of action accrued as of the time 'Plaintiff realized' that the Court found, to-wit, on August 3, 1967, his instant action wouldn't be barred because it was filed on July 6, 1973 within six years of August 3, 1967." (See also Pet. 22) Further the Complaint and Opposition affidavits and Petition show, if believed at Trial, that in reprisal for exercise of his right of free speech about better law enforcement and government, Petitioner was prevented under color of State law, from his expectancy of continued public employment by Respondent's actions.

In brief, aside from claiming that there was no notice to Petitioner that he would not be given reasons and a hearing, and there was lack of notice of any reasons for discharge and a hearing thereon, also, any purported notice to Petitioner before April 6, 1968 meeting of the Township Supervisors would be lack of constitutionally valid notice, which would preclude the running of the Statute of Limitations. See *Shroeder v. City of New York*, 371 U. S. 208 (1962), wherein the Court held that the alleged "notice" of diversion of waters of the Neversink River, did not measure up to the quality of notice which due process of the Fourteenth Amendment requires. Verily, there are substantial Federal Questions.

3. THERE ARE OTHER MISQUOTATIONS OF THE RECORD AND THE PROCEEDINGS WHICH FURTHER EVIDENCE THERE IS A GENUINE ISSUE OF MANY MATERIAL FACTS, LET ALONE OF ANY MATERIAL FACT WHICH CAN'T BE DECIDED ON MOTION FOR SUMMARY JUDGMENT BUT ONLY AFTER TRIAL.

Page 1 of Respondents' Brief states, in the second sentence, "At the first meeting of each calendar year commencing in January, 1963, Yatzor's employment was continued for each such calendar year by the Township Supervisors until the year 1967." This statement of fact is directly contrary to the allegations of Plaintiff's Complaint in Federal Court, and to his Affidavit and Supplemental Affidavit, filed in opposition to Respondents' Motion for Summary Judgment in the District Court (C.C.A.R. 1-18; pp. 134-147; pp. 208-221). In your Petitioner's Statement of Fact at pp. 4 and 5, it sets forth that Petitioner was hired for an *indefinite term of employment* on April 7, 1962, and there was no yearly motion to continue him in employment, except in January, 1965, his compensation was changed from an hourly rate, to $100.00 a month, as has been the custom and practice of the Supervisors to continue all employees in their positions from year to year without formal vote, so he had an expectancy of continued employment. As Respondent appears to be denying this indefinite term of employment, this is a genuine issue as to a material fact, even as regards to the applicability of the defense of the Statute of Limitations, under this Court's own decisions, viz. *Glus v. Brooklyn Eastern District Terminal*, (Supra), *Perry v. Sinderman* (Supra), *Goss v. Lopez* (Supra), and other cases cited by Petitioner, including the Pennsylvania cases on continuing contract of employment, continuing cause of action, estoppel and fraudulent concealment of the accrual of the right of action, all covered before in his Petition. It should be noted here that on page 6 of the Petition, at the

bottom, the Township Solicitor's Opinion is quoted: "This is definitely a hiring at will, as there was no specific period of time for which he was hired . . . ," copy of which Opinion was attached to an Opposition Affidavit of Petitioner in District Court.

Two other genuine issues as to material facts are as to the particular act or acts that created or caused the accrual of Plaintiff's cause of action and when did this occur. On page 5 of Respondents' Brief it claims that Petitioner's *discharge* on January 7, 1967 was "the overt act" which created the cause of action, saying: "Neither does it appear there is a genuine issue of material fact," as to that. This is denied and contested by Petitioner throughout his Petition and in the Record in the Court Below. Respondents admit at page 4 of its brief, "The only genuine issue as to a material fact which existed with regard to the applicability of the defense of the Statute of Limitations was a determination of the *last date on which an overt act* injuring Petitioner had been committed by Respondent." (emphasis supplied) It should be noted here that the expression "overt act" applies to actions based on conspiracy. Although Plaintiff's Complaint in Action was based partly on alleged conspiracy of two of the Defendants, it was much broader than that, and was not based solely and entirely on conspiracy. As was stated in the *Monroe vs. Pape* case (Supra), there is no requirement that defendant's action be wilful in order to hold him liable under 42 U. S. C. 1983; that case stated a person is "responsible for the natural consequences of his actions," (Supra) 365 U. S. at 187.

It was further pointed out in the Petition, pp. 19-26, that the alleged "discharge" or termination of Petitioner's employment was not done in a legally effective way under Pennsylvania law, in the sense of being done by a motion, ordinance or resolution, as required thereby. Therefore, at the earliest, there was no official action of the Township until April 6, 1968 meeting at which the Solicitor's Opinion

was approved. Even by Affidavit of Plaintiff to which a copy of the minutes of that meeting are attached, it shows that there was no official motion, ordinance or resolution discharging or suspending Petitioner at that meeting. Petitioner's Opposition Affidavits filed in the Court Below also have attached copies of Minutes of other meetings prior to this April 6, 1968 meeting, which clearly show there was no such official and definite action of the Township before April 6, 1968, which would have given accrual and given rise to Plaintiff's right of action before. For example, at the January 6, 1968 meeting, the Minutes state: "There was an informal discussion on the police situation by the Board and the visitors and it was decided to wait until the Board had a Solicitor to help decide what should be done." (CCA. 214, 215) Petitioner attended the meeting of February 3, 1968, requesting that he either be given a hearing or be permitted to continue his duties as Chief of Police. The Minutes of that meeting stated: "Mr. Toohey was given information concerning Mr. Yatzor's complaint and would get in touch with Mr. Yatzor's attorney to try and settle this dispute." (CCA. 216, 217)

The Pennsylvania statute in question sets forth: "If the Person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority." (App. D. 10a, 11a) In short, a policeman has to first make a demand for public hearing *after* a written statement of any charges have been furnished him. *After written charges* and a *demand for public hearing, and then a refusal,* only then does his right of action accrue under this particular statute. Petitioner's counsel, by letter dated March 23, 1967, requested written notice of any charges and a hearing thereon. By the Supervisors approving the Solicitor's Opinion at the April 6, 1968 meeting, which stated that this was a hiring at will, and "under the law his services may be terminated at any time and for any reason," this perhaps constituted *a refusal* which caused Plaintiff's right

of action to ripen at that time, at the very earliest. Even if there were no "estoppel" or "fraudulent concealment of the cause of action or the accrual of the cause of action," before or after that time (which Petitioner claims) still his Federal suit filed on July 6, 1973, which was still well within the six-year statute of limitations.

In *Mangan v. McNair*, 321 Pa. 446, 184 Atl. 668 (1936), the Court said that under 46 Purdons Statutes 156, where a statute creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement, such remedy is exclusive and must be strictly pursued. The Court held in that case that the appeal there to the Courts *before the final order* of the Civil Service Commission was *premature*. The Court said at pp. 448, 449: "The Commission has jurisdiction of the case. *After it is disposed of there,* the Courts may give such assistance as the law provides . . ." (emphasis supplied)

Petitioner filing a Petition for Appeal to the Erie County Pennsylvania Court on August 3, 1967 was merely a precautionary measure as there had been no final action of the Supervisors denying him reasons and a hearing. Also, the Record in Federal Court shows that Respondents' Answer to this Petition was not filed in the State Court until May 16, 1969, which corroborates the claim of "estoppel" and "fraudulent concealment of the accrual of the right of action." The Court will recall in the Petition it sets forth the promises between March, 1967 to the April 6, 1968 meeting made to Petitioner that he would be restored to his position without the necessity of litigation and to hold off legal proceedings. (Pet. 6, 7) In short, there was even "waiver" of the defense of the Statute of Limitations during this period of time by Respondents which waiver applies to the Respondents now trying to raise the Statute of Limitations defense. The Police Tenure Act does not set forth the period of time within which the "suspended or dismissed police"

may appeal to the Common Pleas Court of the County. (App. 11a)

In *Vega Appeal*, 383 Pa. 44, 117 Atl. 2d. 736, 1955, the Court held in the absence of any specific provisions for appeal time it couldn't be said that a time less than sixty days is unreasonable in which to file such an appeal especially in view of the fact that the Pennsylvania statute in 53 P. S. 53271 allows a sixty-day period *after final order*. (App. 17a, 18a) In brief, if Petitioner only had sixty days to file his Petition for Appeal in the Erie County Pennsylvania Court from the date of January 7, 1967, which Respondent claims is the date his cause of action arose, because he filed his Petition August 3, 1967 and Defendants did not raise this time of filing as being too late, they must have deemed to have waived the defense of the Statute of Limitations at least as to that period of time. However, there was no *final action* at that time.

Respondents did not record any official action that was legally effective to "discharge, suspend, or remove" Petitioner as Police Chief. The only action that comes closest to official action would be at the meeting of April 6, 1968. If matters of local government could be legislated without any record of it in the Minutes of that local government, the law of the jungle would be the law of local government. In *Rush v. Butler Fair and Agricultural Association*, 391 Pa. 181, 137A 2d. 245 (1958), the Pennsylvania Supreme Court reversed the dismissal of a Bill in Equity on Preliminary Objections of alleged Laches, and said that this question can only be decided at the trial. The Court said at 391 Pa. 185, 186: "The fraud alleged was not the concealment of the renewal of the lease from the shareholders, but rather the sale of the assets of the corporation by the directors and officers at a grossly inadequate price. Acts of concealment independent and additional to this fraud were alleged, *viz. the failure to record the renewal lease, and the omission to enter*

the authorization of the new lease in the Minute Book of the Board of Directors. These acts are sufficient to constitute fraudulent concealment such as would toll the running of the statute. Bailey v. Jacobs, 325 Pa. 187, 189 Atl. 320 (1937) (*failure to enter* upon company books fraudulent withdrawal of corporate funds); *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 53 A. 2d 143 (1947) (*failure to record* unlawful issuance of stock and leases)." (Emphasis supplied) If the Supervisors decided not to give reasons and a hearing to Petitioner before the April 6, 1968 meeting, they did not record this on any of their minutes of meetings held prior thereto. Respondents did not produce any such minutes. Therefore, this was such "fraudulent concealment such as would toll the running of the Statute," as in the Rush case (Supra) and other cited cases. Thus, there is a genuine issue of many disputed material facts that the Lower Courts should not have decided on Summary Judgment, but should be decided at Trial.

Conclusion

For the reasons set forth in the Petition and this Reply Brief, a Writ of Certiorari should be granted.

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CERTIORARI DENIED